ORIGINAL

DOCKET FILE COPY ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

RECEIVED

SEP 2 5 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
MARC SOBEL	)	WT DOCKET NO. 97-56
	)	
Applicant for Certain Part 90 Authorizations in the Los Angeles Area and Requestor Of Certain Finder's Preferences	)	
	)	
MARC SOBEL AND MARC SOBEL D/B/A AIR WAVE COMMUNICATIONS	)	
	)	
Licensees of Certain Part 90 Stations in the Los Angeles Area	)	

To: Honorable John M. Frysiak
Administrative Law Judge

WIRELESS TELECOMMUNICATIONS BUREAU'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Daniel B. Phythyon
Chief, Wireless Telecommunications Bureau

Gary P. Schonman
Chief, Compliance and Litigation Branch
Enforcement and Consumer Information Division

William H. Knowles-Kellett
John J. Schauble
Attorneys, Wireless Telecommunications Bureau

Federal Communications Commission
2025 M Street, N.W., Suite 8308
Washington, D.C. 20554
(202) 418-0569

September 25, 1997

No. of Copies rec'd 0+6
List ABCDE

TABLE OF CONTENTS

SUMMARY

The record in this proceeding demonstrates that Marc Sobel (Sobel) is not qualified to remain a Commission licensee because Sobel engaged in an unauthorized transfer of control of 800 MHz stations and because he misrepresented facts to and lacked candor with the Commission.

Sobel has engaged in an unauthorized transfer of control by allowing James A. Kay, Jr. (Kay) to control the 800 MHz stations licensed to Sobel. Sobel and Kay first entered into an oral agreement which allowed Kay to control Sobel's 800 MHz stations. When the Commission raised questions about the relationship between Sobel and Kay, they executed a written agreement. Kay has the unilateral authority to extend the agreement for up to fifty years. Kay controls virtually every aspect of the stations. Kay controlled the application filing process and provided the equipment and money needed to construct the stations. Kay and his employees sell air time on the stations, bill the customers, collect from the customers, work with the customers, and work on the equipment. Sobel's involvement in the stations is as a contractor selected and paid by Kay. Kay controls the major policy decisions relating to the stations. The employees who work on the stations are hired, supervised, and fired by Kay. Kay pays all the operating expenses relating to the stations, and he has received all the operating revenue from the stations. Kay can purchase the stations, which a third party offered to buy for $100,000 a station ($1.5 million total), for $500 each during the term of

the agreement. Sobel, on the other hand, cannot sell the stations without Kay's permission. When the record is analyzed under the Intermountain Microwave factors, the evidence shows that Kay, not Sobel, controls these stations, and that Sobel has engaged in a willful violation of Section 310(d) of the Communications Act of 1934, as amended.

The evidence also shows that Sobel misrepresented material facts and lacked candor in two affidavits submitted to the Commission in January 1995. Sobel understood the Commission wanted information concerning the relationship between himself and Kay. Sobel, however, offered to the Commission affidavits that contained misrepresentations and offered a wholly misleading picture of the relationship between Sobel and Kay. Sobel knew the claim that Kay had no interest in any station or license of which Sobel was the licensee was false. Several other statements in the affidavits were also misleading. Sobel's explanations for these statements at the hearing were illogical and inconsistent.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
	)	
MARC SOBEL	)	WT DOCKET NO. 97-56
	)	
Applicant for Certain Part 90 Authorizations in the Los Angeles Area and Requestor Of Certain Finder's Preferences	)	
	)	
MARC SOBEL AND MARC SOBEL D/B/A AIR WAVE COMMUNICATIONS	)	
	)	
Licensees of Certain Part 90 Stations in the Los Angeles Area	)	

To: Honorable John M. Frysiak
Administrative Law Judge

WIRELESS TELECOMMUNICATIONS BUREAU'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Acting Chief, Wireless Telecommunications Bureau, by his attorneys, now proposes the following findings of fact and conclusions of law for the resolution of the issues in this proceeding.

PRELIMINARY STATEMENT

1. By Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 12 FCC Rcd 3298 (1997) (HDO), the Commission instituted a revocation proceeding against the following licenses held in the name of Marc D. Sobel (Sobel): KAC8275 (GMRS), KD53189 (Business), KNBT299 (Conventional SMR), KRU576

(Conventional SMR), WIH718 (Business). WIJ516 (Business), WIJ698 (Business), WIJ716 (Business), WIK548 (Business), WIK657(Business), WIK833 (Business), WIL516 (Business), WIL598 (Business), WNPX844 (Business), WNPY680 (Conventional SMR), WNWB334 (Conventional SMR), WNXL471 (Conventional SMR), WNYR424 (Conventional SMR), WNZC764 (Business), WNZJ445 (Business), WNZS492 (Conventional SMR), WPAD685 (Conventional SMR), WPCA891 (Conventional SMR), WPCZ354 (Conventional SMR), WPDB603 (Conventional SMR), WPFF529 (Conventional SMR), WPFH460 (Conventional SMR), and WPCG780 (Conventional SMR). The Commission also designated for hearing the following pending applications filed by Sobel:

File No.	Date Filed	Call Sign	Frequency	Service	Type
670861	6/9/94	KKT934	851.8875	Conventional SMR	Assignment
415367	4/18/94	______	507.2875	Business	New
697577	3/22/95	WPAD685	852.1625 852.4125	Trunked SMR	Modification
416021	7/31/95	______	472.4125	Business	New
154618	5/16/95	______	463.6750	Business	New
501542	4/17/95	WPCZ354	853.1375	Conventional SMR	Reinstate
666673	5/6/94	WNWB334	854.0375	Conventional SMR	Modification
415478	9/16/94	______	471.9375	Business	New
614567	11/13/92	WNZS492	854.0875	Conventional SMR	Modification

R28310	12/15/94	WIJ716	471.8375 474.8375	Business	Renewal
R28311	12/15/94	KD53189	465.7375 468.7375 468.6125 463.4875 463.6125 468.5375 463.5375	Business	Renewal
D024171	2/20/96	WIK833	471.5125 474.5125	Business	Assignment
	1/24/96	WIK833	471.5125 474.5125	Business	Renewal

The Commission also held in abeyance five finder's preference requests filed by Sobel.

2. The Commission designated the following issues for resolution in this proceeding:

(a) To determine whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications have willfully and/or repeatedly violated § 310(d) of the Communications Act of 1934, as amended, by engaging in unauthorized transfers of control of their respective stations to James A. Kay, Jr.;

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications are qualified to be and remain Commission licensees;

(c) To determine whether the above-captioned applications filed by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be granted.

(d) To determine whether the above-captioned licenses held by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be revoked.

3. Paragraph 10 of the HDO placed the burden of the introduction of evidence and the burden of proof on the Wireless Telecommunications Bureau with respect to issues (a), (b), and (d). The burden of the introduction of evidence and the burden of proof on issue (c) was placed with Sobel. The HDO also directed the Presiding Judge to determine whether a forfeiture should be issued against Sobel for willful and repeated violations of §310(d) of the Communications Act.

4. By Memorandum Opinion and Order, FCC 97M-43 (released March 24, 1997), the Presiding Judge granted the "Petition to Intervene" filed by James A. Kay, Jr. (Kay) and named Kay a party to the proceeding.

5. By Memorandum Opinion and Order, FCC 97M-82 (released May 8, 1997), the Presiding Judge added the following issues against Sobel:

> (a) To determine whether Marc Sobel misrepresented material facts or lacked candor in his affidavit of January 24, 1995.
>
> (b) To determine, based upon the evidence adduced pursuant to the foregoing issues, whether Marc Sobel is basically qualified to be and remain a Commission licensee.

The burdens of proceeding and of proof under those issues were placed on the Wireless Telecommunications Bureau.

6. Hearings on all the issues were held in Washington, D.C. on July 29 and 30, 1997. The record in this proceeding was closed on July 30, 1997. Tr. 377.

PROPOSED FINDINGS OF FACT

A. Transfer of Control Issue

1. Background of Sobel-Kay Relationship

7. Marc D. Sobel (Sobel) graduated from high school and attended California State Northridge for 1 1/2 years. Tr. 68. He has operated 450 MHz land mobile stations since 1978. Id. He deals in equipment, installs and repairs radio equipment, and helps other companies design radio systems. Id.

8. James A. Kay, Jr. (Kay) started dabbling in radio and operating a radio/television repair service in 1972 or 1973. Tr. 325. He started providing repeater service on a commercial basis in the early 1980s. Id. Kay holds approximately 152 licenses from the FCC, of which approximately 50 licenses are in the 800 MHz band. Tr. 329-330. He has approximately seventy-five repeaters in the 800 MHz band that are licensed to him, and he also manages around 25 to 30 additional 800 MHz repeaters that are licensed to other entities. Tr. 330. Kay does business under the name Lucky's Two-Way Radios, which provides repeater service and does some site rental business. Tr. 333-334. Kay is the sole stockholder and president of Buddy Corp., which does business under the fictitious business name of Southland Communications. Tr. 334. Southland provides sales, service, and installation of two-way radios. Id.

9. Sobel has known Kay for about 20 years. Tr. 71, 326. They first met when Sobel was working at Sandy's Electronics and Kay was a customer there. Id. Kay and Sobel

were both active in Citizens Band radios in the 1970s (Tr. 326), and they have been friends since the 1970s. Tr. 71, 326-327. They have repaired equipment, shared leases, and helped each other for more than a decade. Tr. 327. Since the mid-to-late 1980s, Sobel has installed, maintained and serviced Kay's repeaters as a contractor paid by Kay. Tr. 72, 106, 327. Sobel repairs and maintains approximately 350 stations that Kay currently owns or manages. Tr. 105. Sobel has had the first call to repair, maintain, and install Kay's stations (Tr. 105), except for three sites where another contractor is located much closer to the sites than Sobel. Tr. 105, 328. Kay generally turns to Sobel when there is a difficult and complicated technical problem that Kay will not handle himself. Tr. 328. Kay will also ask Sobel to contact a potential customer to solve a troubling problem that Kay's regular staff is unable to solve. Tr. 327. Sobel might perform that service as often as twice a month. Tr. 72, 328. On occasion, Sobel will also contact someone on Kay's behalf to determine whether they are still operating a station. Tr. 72. If they were not operating, Sobel will help Kay get the license cancelled. Id. If the licensee was operating, Sobel would attempt to convince the licensee to change over to Mr. Kay's system. Tr. 72-73.

10. WTB Ex. 25 consists of invoices Sobel sent to Kay for work Sobel did on Kay's behalf. Tr. 114. The invoices cover the period October 1990 to April 1997. WTB Ex. 25, Pp. 1, 80. The invoices reflect approximately 3,360 hours of work that Sobel performed for Kay and requested payment for that work. WTB Ex. 25, Pp. 1-80. Over that six and a half

year period, Sobel charged Kay for an average of approximately ten hours per week of work.[1] Sobel works at his business from 30 to 60 hours a week. Tr. 199. Sobel currently bills Kay $30 per hour for work Sobel performs. Tr. 245, WTB Ex. 25, P. 1. Sobel currently bills end users $75 per hour, and other dealers $30 to $50 per hour. Tr. 245. Kay receives the lowest rate Sobel charges. Id. In 1990, Sobel charged Kay $18 per hour, but his standard rate was $50 per hour. Tr. 246. Kay has always received a reduced rate because of the large amount of work Sobel performs for Kay. Id.

11. About half of Sobel's income is derived from the sale of repeater service. Tr. 249-250. The other half of his income is derived from the sales, service, and maintenance of radios (including equipment sales) and consulting work. Tr. 250. Sobel's gross revenues listed on his Schedule C, Form 1040 in 1996 were about $192,780, and his gross income for that year was about $152,400. WTB Ex. 26, Tr. 133. Sobel estimates that he received approximately $19,000 from Kay or his companies in 1996. Tr. 252. That figure represents about one-tenth of Sobel's gross revenues and one-eighth of his gross income. In 1995, Sobel's gross revenues were about $156,630, and his gross income was about $109,020. WTB Ex. 28, Tr. 133-134. Sobel estimates he received approximately $22,337 from Kay or his companies. Tr. 253. That figure represents about 14.3 percent of gross revenues, and about 20.5 percent of gross income. In 1994, Sobel's gross revenues were about $169,120, and his gross income was about $109,180. WTB Ex. 31, Tr. 134. While Sobel does not have

[1] The figure of approximately ten hours a week is calculated by dividing 3,360 hours by 330 weeks, which represents 6 1/2 years times 50 weeks a year (assuming, for ease of calculation, that Sobel is on vacation or otherwise not working two weeks out of the year).

tax records reflecting monies received from Kay in 1994, he estimates he received between $10,000 and $20,000 from Kay and his companies for that year. Tr. 254. In 1993, Sobel's gross revenues were $145,466, and his gross income was $112,035. WTB Ex. 32. Sobel estimates he received approximately $24,517 (about 16.8 percent of gross revenues, and about 21.9 percent of gross income) from Kay or his companies in 1993. Tr. 254. In 1992, Sobel's gross revenues were $145,022, and his gross income was $95,848. WTB Ex. 34, Tr. 255. Sobel estimates he received approximately $19,130 (about 13.2 percent of gross revenues, and about 19.6 percent of gross income) from Kay or his companies in 1992. Tr. 255.

2. Background of the Management Agreement Stations

12. In the early 1990s, Sobel became interested in holding 800 MHz licenses himself. Tr. 73. Sobel asked Kay if he would help Sobel get involved in 800 MHz licenses. Id. Sobel approached Kay for assistance because he knew Kay had 800 MHz stations that were making money. Tr. 183-184. Kay agreed to help. Tr. 73. While Sobel believes he could have prepared the applications himself, he relied on Kay to prepare the applications because Kay had the software and additional knowledge needed to prepare the applications, and because it was more convenient to have Kay prepare the applications. Tr. 184.

13. Around the time the first 800 MHz station in Sobel's name[2] was being constructed in the early 1990s, Sobel and Kay reached an oral agreement under which Kay would provide

[2] For ease of reference, the 800 MHz stations licensed in Sobel's name and managed by Kay will be referred to as the Management Agreement stations.

the equipment and money needed to construct and to operate the Management Agreement stations, manage and market those stations, and pay all the operating expenses. Tr. 103-104. In return, Kay would receive the first $600 of revenue each month from each station, and the revenue over and above that would be split equally between Kay and Sobel. Tr. 104. Sobel did not have the disposable funds to invest in 800 MHz at the time he obtained the licenses. Tr. 187. Sobel did not have the option of going into 800 MHz on his own. Id. Sobel estimated that it would cost $500 to $600 a month to lease a repeater site and the equipment needed for the repeater, install, maintain and repair the equipment, and obtain insurance. Tr. 104.

14. Under the oral agreement, Sobel was to be the person responsible for maintaining, repairing, and installing the Management Agreement stations. Id. Sobel performed most of the actual construction and installation. Tr. 107. Sobel performed that work as a contractor for Kay, and he was paid an hourly fee by Kay for that work. Tr. 106-108. Sobel cannot distinguish based upon his invoices what work he has done on the Management Agreement stations and what work relates to Kay's stations. Tr. 116, 243. Kay selected and purchased the equipment needed to construct the stations. Tr. 107, 351, 353. Kay did not keep track of which equipment went to stations licensed to him and which equipment went to the Management Agreement stations (or other stations he managed). Tr. 354.

15. At some point between the time Kay and Sobel entered into their original oral agreement and the time they entered into a written management agreement, they orally agreed

that Kay would have an option to purchase the Management Agreement stations for $500 each. Tr. 108. Kay asked for the option because he needed to protect himself since his customers were on Management Agreement stations. Tr. 365-366.

16. At some point in late September or October 1994, in response to a Freedom of Information Act (FOIA) request, Kay received a draft hearing designation order relating to his qualifications to be a Commission licensee. Tr. 261. Kay informed Sobel that the draft order contained the following language (or substantially similar language):[3] "Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. Kay could use multiple names to thwart our channel sharing and recovery provisions. We believe these names include . . . AirWave Communications and Marc Sobel, d/b/a AirWave Communications." Tr. 259, 262.

17. Based on the language in the draft hearing designation order, and because of Kay's problems with the FCC and his knowledge that parties had complained about the relationship between Sobel and Kay, Sobel asked Kay to have their oral agreement reduced to writing. Tr. 108-109, 262. On October 28, 1994, Kay and Sobel executed a "Radio System Management and Marketing Agreement." WTB Ex. 38, Tr. 108. The agreement was prepared by Brown & Schwaninger, a law firm representing both Kay and Sobel. Tr. 109.

---

[3] The quoted language is from the actual order designating Kay's licenses for hearing. Tr. 258-259.

18. Under Paragraph VII A. of the management agreement, Kay was required to pay Sobel an option fee of $100 as consideration for the option to purchase the Management Agreement stations. WTB Ex. 38, P. 4, Tr. 111. Kay initially forgot to pay the option fee. Tr. 111. In addition, the agreement had some clerical errors, and some stations were omitted from the agreement. Tr. 110-111. Kay and Sobel entered into a new written agreement to allow Kay to pay the $100, thus making the option binding, and to make the corrections to the agreement. Id. WTB Exs. 39 and 40, which are the December 30, 1994 agreement and an addendum, constitute the written agreement between Kay and Sobel concerning the Management Agreement stations. Tr. 112. There are no other written agreements between Kay and Sobel concerning the Management Agreement stations. Tr. 361.

19. The agreement is effective for ten years. WTB Ex. 39, P. 6. The agreement automatically renews for five consecutive ten year periods unless Kay alone gives notice to the contrary at least ninety days prior to the end of the term. Id. Sobel has no right to prevent the agreement from automatically renewing. Id.

3. Access to and Use of Equipment

20. Paragraph III of the Management Agreement provides:

> Agent [Kay] shall be the sole and exclusive supplier of all equipment and labor required to maintain and repair the Stations' facilities, employing Agent's reasonable best efforts. Agent may either supply required labor and equipment and labor directly or may supply required equipment and labor through arrangements with other firms on behalf of Agent.

WTB Ex. 39, P. 3. Kay selected, purchased and provided all the equipment used in connection with the Management Agreement stations. Tr. 107, 351, 353. Paragraph IV of the agreement provides that all equipment provided to Kay shall remain his sole and exclusive property. WTB Ex. 39, P. 3. The equipment was "leased" to Sobel for a term coterminous with the agreement, but Sobel was given no title, interest, or control over the equipment, except to the extent he was granted permission to use Kay's equipment. Id.

21. As discussed below in greater detail, Sobel currently works on maintaining and repairing the Management Agreement stations. Tr. 112. Nothing in the management agreement provides that Sobel will be the person who maintains and repairs the stations. Tr. 113, 359-360. Paragraph XX of the management agreement provides that the agreement "is the entire agreement between the Parties with respect to the subject matter thereof, making void all previous negotiations and agreements . . ." WTB Ex. 39, P. 8. Sobel testified that it was not necessary to have a provision in the agreement stating that he would maintain and repair the facilities because he was already performing that work. Tr. 113. Kay testified that it was a "basic assumption" that Sobel would be performing the work. Tr. 360.

22. Most of the Management Agreement stations and Kay's stations are located high on mountaintops. Tr. 118. Generally, Sobel must drive through locked security gates to get to the sites. Id. The buildings at the sites, as well as the cabinets containing the equipment, are often locked. Id. For both the Management Agreement stations and the Kay stations, Sobel has in his personal possession the keys he needs to access the sites and the equipment. Id.

Generally, the control points for the Management Agreement stations are located at Sobel's home office, Sobel's car, and Kay's office. Tr. 118-119.

23. Paragraph VIII of the Management Agreement, provides, inter alia:

> Licensee shall retain ultimate supervision and control of the operation of the Stations. Licensee shall have unlimited access to all transmitting facilities of the Stations, shall be able to enter the transmitting facilities and discontinue any and all transmissions which are not in compliance with the FCC Rules and shall be able to direct any control point operator employed by Agent to discontinue any and all transmissions which are not in compliance with FCC Rules.

WTB Ex. 39, P. 5.

4. Control Over Daily Operations

24. Paragraph I of the management agreement provides that Kay shall be the sole and exclusive agent for the sale of all services provided by the Management Agreement stations. WTB Ex. 39, P. 2, Tr. 119. Kay's duties include all administrative duties associated with marketing the stations, including, but not limited to, bookkeeping, billing and collections. WTB Ex. 39, P. 2. Kay is given the "sole and exclusive discretion" to negotiate and execute contracts with customers, and Sobel is relieved of any liability under those contracts. Id. Paragraph II of the management agreement appoints Kay as the "sole and exclusive Agent for the management of the Stations' transmitting facilities and associated business." Id. Kay's duties under this provision include "all management functions associated with the operation of the Stations, including but not limited to the invoicing of users, collection of payments from

users, bookkeeping and accounting processes, disbursement of payments to suppliers of goods and services, and control point operation." Id. Kay employs a staff to assist in these duties. Tr. 339, et seq. Kay has the sole and exclusive right to negotiate and execute any contracts entered into under Paragraph II of the Management Agreement, and Sobel has no liability under those contracts. WTB Ex. 39, P. 2.

25. When a customer receives service on one of the Management Agreement stations, the customer signs a contract which is also signed by Kay. Tr. 119. The Management Agreement stations have several hundred customers. Id. Sobel does not know the number of customers per month who have signed up to be on the Management Agreement stations in 1997. Tr. 122. Sobel recruits customers himself on his 450 MHz stations. Tr. 119. On occasion, Sobel will be approached by a customer who would be better placed on an 800 MHz system. Id. In that instance, Sobel will refer those customers either to Mr. Kay's stations or one of the Management Agreement stations. Tr. 119-120. He has not placed more than a handful of customers on the Management Agreement stations. Tr. 120. Kay and Sobel refer customers to one another, and they both receive referrals from and give referrals to other dealers. Tr. 318-319.

26. Kay's employees deal with the customers. Tr. 343. Kay's salespeople sell radios. Tr. 344. The salespeople do not know whether they are selling time on a repeater Kay owns, a repeater Kay manages, or a community repeater. Id. Some of Kay's customers are on Kay's stations, some customers are on just managed stations, and some customers are on both

types of stations. Tr. 348-349. The important consideration in determining where a customer is placed is the needs of the customer. Tr. 344-345. Kay looks at factors such as where service is needed, how much air time is needed, when the air time is needed, and whether the customer is conventional or trunked. Tr. 345. Ownership of the repeaters is not an important factor in determining where to place a customer, and Kay does not prefer stations licensed to himself over stations licensed to Sobel. Tr. 346. When a salesperson has made a sale, the salesperson will go to Barbara Ashaur, a Kay employee, and request that a code and frequency be assigned. Tr. 344. About half the time, the salesperson will make the initial recommendation as to where to place the customer. Tr. 345. Sometimes, Ms. Ashaur can take care of assigning the codes herself. Tr. 347. If Ms. Ashaur needs specific frequencies assigned or needs further assistance for some other reason, she will ask either Sobel or Kay for assistance, regardless of who owns the repeater in question. Id. Sobel assigns "an awful lot" of frequencies for Kay's stations. Id. Once the frequency and code are assigned, Ms. Ashaur generates a request to activate the customer's radio system. Id.

27. Only Sobel and Kay have the access codes needed to activate repeaters. Tr. 124. Kay's repeaters have computerized controllers, and each customer is assigned a specific code. Id. When the customer's code is activated, and the customer's radio transmits that tone, the repeater will repeat that customer's signal. Tr. 124-125. Sobel testified that he turns on "all" the codes for the Management Agreement stations, and he conducts the majority of the activations on Kay's stations. Tr. 123-124. Kay testified that Sobel performs slightly more than two-thirds of the activations for both the Management Agreement stations and Kay's

stations. Tr. 347-348. When Sobel reviews frequency placement and activates customers on either the Management Agreement stations or Kay's stations, he is paid an hourly fee by Kay for that work. Tr. 125.

28. Kay and his employees bill customers and collect fees from customers for the Management Agreement stations. Tr. 120. A lot of customers (about 500 to 700) use both Kay stations and Management Agreement stations. Tr. 348-349. By and large, those customers receive one consolidated bill, unless the customer wishes to receive separate bills. Tr. 349. Kay or his employees perform the bookkeeping relating to the Management Agreement stations. Tr. 120. Kay or his employees make sure any obligations incurred with respect to the Management Agreement stations get paid. Id. Kay or his employees keep and maintain the financial records for the Management Agreement stations. Tr. 120-121, WTB Ex. 39, P. 6. Sobel reviews the revenue levels for the Management Agreement stations every few months or six months. Tr. 121-122. He obtains the information from Kay's computer. Tr. 121. Sobel has free access to Kay's office during business hours. Tr. 237.

29. Sobel can learn of the need to work on the Management Agreement stations either from Kay's office or by monitoring the stations himself. Tr. 116. Sobel monitors the Management Agreement stations possibly at least once a month. Tr. 117. Sobel monitors Kay's stations as often as he monitors his own stations. Id. Currently, Kay rarely monitors the stations, although he monitored the stations more regularly until a couple of years ago. Id. Some of Kay's employees also monitor the Management Agreement stations when a

customer calls and says a station does not work. Id. While giving a time frame is difficult, Sobel estimates that he maintains or repairs Management Agreement stations as a whole several times a month. Tr. 114. Sobel cannot distinguish based upon his invoices what work he has done on the Management Agreement stations and what work relates to Kay's stations. Tr. 116. It did not make any difference to Kay whether Sobel was working on a Management Agreement station or a station licensed to Kay. Tr. 243. Whenever Sobel performs work relating to a Management Agreement station, he is working as a contract technician for Kay, and Kay pays Sobel an hourly fee for that work. Tr. 106, 144.

30. Kay's technicians will check the repeaters and other equipment for stations Kay owns or manages. Tr. 341-343. A technician working on a repeater would have no reason to know who holds the license. Tr. 343. Similarly, a salesperson selling air time to a customer would have no reason to know whether the station the customer will be using is licensed to or managed by Kay. Tr. 344. By and large, none of Kay's employees performing work on a station would have any reason to know to whom the station is licensed. Tr. 340.

31. Sobel does not consider himself to be an absentee owner because he is involved in the operation of the stations on a day-to-day basis. Tr. 293-294. That involvement is as a contractor selected and paid by Kay. Tr. 144.

5. Application Preparation and Policy Decisions

a. Preparing of Applications

32. Kay did the research needed to locate available frequencies for which Sobel could apply. Tr. 73. Kay would then tell Sobel of the frequency and review with Sobel information such as who else was on the channel, where the repeater would be located, and the need for the repeater. Tr. 73-74.

33. The Management Agreement stations are located at the following sites: Mount Lukens, Santiago Peak, Snow Peak, Hollywood Hills, Mount Wilson, Heaps Peak, and possibly Sunset Peak. Tr. 79-84.[4] Sobel uses the Hollywood Hills site for his 470 MHz stations, and he leases that site from Louella McNeal. Tr. 78. Sobel, in turn, subleases that property to Kay, who pays Sobel $7,000 to $8,000 a year in rent. Tr. 78, 250-251. For each of the other sites, Kay made the arrangements with the property owners to make sure the Management Agreement stations could operate from those sites, and he has leases with the property owners for those sites. Tr. 84-85. Under the management agreement, a transmitter site may be relocated on sixty days notice to Kay only if the relocation is in the best interests of both parties. WTB Ex. 39, P. 5.

[4] Many of the sites listed on the licenses (WTB Exs. 2-18) are secondary sites which are not required to be constructed under the Commission's Rules. Tr. 80. In several cases, Sobel could not recall whether secondary sites listed on his licenses had been constructed. Tr. 80-83.

34. Sobel initially testified that Kay prepared "most" of the Management Agreement applications. Tr. 74. He claimed that there were times when he prepared the applications personally, but he could not recall which applications he prepared. Id. The applications were prepared using specialized software from Slattery Software that Kay had on his computer. Tr. 74-75. Kay had a template in his computer that showed the various locations and contained the technical information needed for the applications. Tr. 206. The majority of Sobel's applications contain handwritten information concerning emission designators. WTB Ex. 1, Pp. 5, 8, 10, 12, 14, 16, 19, 21, 24. In every case, the handwriting is that of Kay. Tr. 76-78. While Sobel believes he could have prepared the applications himself, he knew Kay had the software and additional knowledge needed to prepare the applications, and it was more convenient "that he did the applications for me." Tr. 184.

35. Item 37 on FCC Form 574 asks for the name of the individual who completed the application form. WTB Ex. 1. In some of the Management Agreement applications, Sobel is sometimes identified as the person who completed the form, while in other applications, Kay is listed as the preparer. Id. Kay and Sobel construed Item 37 as asking for the identity of the person who should be contacted if there is a question, rather than asking who actually prepared the application. Tr. 208. Sobel is thus sometimes listed as the preparer of applications which were in fact prepared by Kay.

36. In some services, the Commission requires a non-agency entity called a "frequency coordinator" to review a land mobile application before it is submitted to the

Commission in order to ensure that the application complies with the Commission's technical regulations and to ensure that spectrum is available. Tr. 86. The National Association of Business and Educational Radio (NABER) was a frequency coordinator for the frequencies used by the Management Agreement stations. Id. NABER requires applicants to fill out a form asking for basic information. Id. When dealing with NABER, Kay filled out the forms, and Sobel then signed the forms. WTB Ex. 2, Tr. 86-87.

37. Sobel reviewed and signed each application for the Management Agreement stations. Tr. 75, 206-207. The only edits Sobel can remember making to the applications occurred a couple of times when Kay misspelled Sobel's name. Tr. 75.

38. Kay has prepared letters for submission to the Commission regarding the Management Agreement stations. Tr. 335. Ordinarily, when the Commission finds a problem with a land mobile application, it returns the application to the applicant with an application return notice. Tr. 234. The record contains three responses to application return notices involving Management Agreement Stations -- all three responses were prepared by Kay. WTB Exs. 19, 21, 23; Tr. 88, 92, 96, 335-336, 338, 339. Sobel received the application return notices and asked Kay to prepare responses. Tr. 228-229.

b. Clearing of Channels and Acquisition and Disposition of Licenses

39. Unlike other services, land mobile frequencies are often shared with different licensees on the same frequency in the same area (an encumbered channel). Tr. 193. Under

certain circumstances, however, a licensee can get exclusive use of a channel in an area (a clear channel). Id. A clear channel has several advantages over an encumbered channel. With a clear channel, a licensee can operate in an enhanced mode, there is no need to monitor the frequency for other users, and clear channels are substantially more valuable than encumbered channels. Tr. 195. There are several actions that can be taken towards clearing channels. If a party finds that another licensee has not operated its station for a year, it can ask the Commission to cancel the license and, in some cases, give the party the first opportunity to apply for the cancelled license. Tr. 196-197. If a co-channel station is operating, the licensee can attempt to persuade the co-channel licensee to cancel or to assign its license in return for new equipment or for favorable rates on repeater service on the licensee's repeaters. Tr. 197-198.

40. All of the initial applications for the Management Agreement stations were for encumbered channels. Tr. 198-199. Sobel claims that he did not have the time or the money to do the work needed to clear the channels himself. Tr. 199. Kay and Sobel therefore agreed that Kay would do the work and spend the money needed to clear the channels used by the Management Agreement stations. Id. Sobel knew Kay had been successful in this activity in the past, and he believed Kay had the knowledge and staff needed to do this work. Id. Sobel works from 30 to 60 hours a week. Id. As a contractor, he has assisted Kay in doing the work needed to clear Kay's channels. Tr. 72-73.